

self. This was true in his writing and, it now occurs to me, often in person as well — which is to say he was writing even when he wasn't writing, and that is part of what made him such a talented writer.

He once told me the word he would most like used to describe him. The word was "sassy." I'll oblige him and say he was that — in his writing, but not in person. (Sometimes prickly, not sassy.) In person, John was unusually generous and loyal. He was a good friend, and (for a supposed isolate) he had many. Even in his writing, traces of sweetness are discernable. On occasion, there was more than a trace. (Look at his account in *On Constitutional Ground* of deciding to be a public defender rather than a prosecutor and of choosing to be a vegetarian.) On occasion, it inhabits the very core of his argument. (Think of the theory of prejudice at the heart of his "great" book.) Typically, however, his impulse as a writer was to sublimate any sentimentality, and then season it with a little sass.

In writing, John's motto was: style, not sentiment. I watched him rework a sentence. It had to be, at once, strikingly unusual, almost beautiful, and easily understandable. We talked about how to make unconventional ideas seem easy and how a distinctive personal style can contribute to that end. For him, the point of style was not to "capture" a thought, but to give it life, to set it spinning in the mind of a reader — and, perhaps not so incidentally, to create, in the same mind, an image of himself as the performer of his ideas.

John began one article — an early one about affirmative action — with the following two sentences: "The problems were so intractable that this time it really looked like Fred and Ginger might not get together. But then Fred sang 'I Used to be Color Blind,' and suddenly we knew that everything would turn out all right." I like to think of John, now, joining Fred and Ginger, swirling up vast curving staircases, pausing, posing, gliding on, dancing on air, as stylish as they come.

*Aviam Soifer**

Ely the Transgressor

Top-of-the-charts citation counts hardly capture John Hart Ely's formidable role in American constitutional law. John's impeccable

* Dean and Professor, William S. Richardson School of Law, University of Hawaii, Manoa.

Establishment credentials as a student, teacher, and dean — at schools including Princeton, Yale, Harvard, and Stanford — misleadingly suggest that he was influential because he was an insider.¹ John's uncanny ability to be present (and directly involved) at the creation of such significant matters as *Gideon v. Wainwright*,² the Warren Commission,³ and the 1964 Term of the Warren Court might underscore such a misperception.⁴ In fact, John delighted to cross the usual lines and to elude classification. Perhaps it was his strong ego that allowed him to be generous to the unfamous and to those in need of protection.

After his clerkship with Chief Justice Earl Warren, for example, John took off with his gilt-edged credentials to be a public defender in San Diego — before that city had a full complement of major league sports teams and the accompanying recognition from many people that this was a real American city. Perhaps it was his upbringing by his mother, sometimes spending lonely winters in places that sparkled only in the summer, that gave John considerable affection for the demi-monde. In any event, somewhere John acquired a keen sense of an outsider's perspective.

John was jumpy with both physical and intellectual kinetic energy, and he would not be tied down. His self-confidence freed him to delve deeply in matters far beyond the scuba diving passion he pursued around the world. He tended to think abstractly, with a philosopher's

¹ John's credentials also included a Fulbright at the London School of Economics, Visiting Committee for the Philosophy Department at Princeton and Board of Advisors at Boston College Law School, honorary degrees from Yale, San Diego, and Chicago-Kent, and Fellow of both the American Academy of Arts and Sciences and the Council on Foreign Relations. Significantly, the University of Miami was almost surely his happiest teaching gig, and he was particularly energized at Miami by the engaged diversity of his considerably younger colleagues.

² 372 U.S. 335 (1963). The story of that decision, and of John's role as young assistant to attorney Abe Fortas, is told beautifully in ANTHONY LEWIS, *GIDEON'S TRUMPET* 196 (1964).

³ John recently revisited the Warren Report and concluded that new evidence clearly demonstrates that the CIA blatantly lied to the Commission. John Hart Ely, *Reputation Be Damned* (So Long As It's Yours) 14–16 (Aug. 2000) (unpublished manuscript, on file with the Harvard Law School Library).

⁴ Another Footnote Four seems the right place to mention that John, as a witness to history, had none of the passivity of Woody Allen's Zelig. In fact, he was a participant-observer who remained actively involved long after the events. For instance, he frequently returned to the race discrimination and voting rights problems that were crucial to the Warren Court's legacy. See, e.g., *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 135 (Jack Balkin ed., 2001); John Hart Ely, *Confounded by Cromartie: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?*, 56 U. MIAMI L. REV. 489 (2002); John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607 (1998) [hereinafter Ely, *Gerrymanders*]; John Hart Ely, *If at First You Don't Succeed, Ignore the Question Next Time? Group Harm in Brown v. Board of Education and Loving v. Virginia*, 15 CONST. COMMENT. 215 (1998). Similarly John's careful, idiosyncratic, and yet compelling arguments regarding the war power reflected his direct engagement with his times. JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993).

keen sense of thrust and parry. But he avoided cloud-cuckoo land and regularly brought legal theories back to earth. His crisp, often strikingly funny writing style embodied his ability to bounce back and forth critically between accepted norms — and then somehow to blaze new trails.

To hang out with John was to enjoy the company of a brilliant, boyish, self-contained, and very funny iconoclast. John loved popular culture and had a soft spot for funkiness. No one could match him in his knowledge of the Everly Brothers, for example, or in his enthusiasm for collecting kitschy tourist bumper stickers. Nor were there many who were his equal as a devoted sports aficionado, with particular expertise concerning unsung heroes. (A cover note on a draft article he sent me in late August 2000, for instance, said only, "What I really want to know is why this guy Helton isn't getting more ink? He's been over .390 for months."⁵)

When John wrote with acuity and flair about why we need judges to reinforce representative government or Congress to show more guts regarding the war powers, he particularized his own profound general points as if from outside, often via quirky parentheticals. Stressing the malleability of us-them classifications in life and law, John probed the false dichotomies that judges and academics favor in a withering, often idiosyncratic fashion. Yet his transformative argument in favor of democratic structure was anchored, firmly but somewhat paradoxically, in the perspective of a confident individualist highly self-aware of his own peculiarity. In clearly thinking from beyond the pale, John was cogent about the dangers lurking within individual judicial values.

To watch John teach was to witness the phenomenon of someone functioning as an active outside observer of his own teaching process. He tended to interrupt himself to comment — at times only in a mumble and frequently quite hilariously — about what he had just said to the class.⁶

John's students, readers, and friends shared an experience that was and will remain exceedingly rare. We discovered a powerful thinker doing some serious work while simultaneously puncturing pomposity. In his recent work, for example, he pierced accepted wisdom about voting districts and anti-miscegenation laws and the interclausal cross-textualism of the Constitution in order to say important, provocative

⁵ As someone who famously stressed distrust along with democracy, John understood the urge to footnote quotations such as this, to assure the reader that the *Law Review* has a copy (which it does). He also would have laughed at the absurdity.

⁶ This unusual teaching style did not appeal to all students. Yet the fact that David Letterman at his best often seemed to be imitating Professor Ely's technique made it more popular in recent years, as did echoes of Ely some found vividly reenacted in the character of President Bartlett on *The West Wing*.

things about politics and favoritism, race and stigma, and progress in American law. John was comfortable forging his own very distinctive path. To be sure, he appreciated recognition, but he had no fear of being the consummate outsider.

John had been a college radio d.j. and later became a talented jazz pianist. The trope of analogies that lawyers favor thus makes it tempting to compare him to Charles Mingus or even Fats Waller (perhaps the visual disconnect is amusing enough to make the comparisons worth contemplating). But a John Hart Ely-Bill Russell comparison makes more sense.

Like Bill Russell, John added an entirely new dimension to the game he played.⁷ Strong defense mattered most to both men. Both pioneered how to block their opponents' best shots, and both altered the flow of the entire game through their court presence. Ironically, Ely and Russell were two loners who nonetheless managed to be at the core of some legendary teams. Natural talent might mislead in both cases. They were gamers who worked exceptionally hard to take their unquestioned talent as far as possible. Yet each also used quiet but unmistakable intensity to mask his subversive humor and his awareness that even the game he loved was, after all, only a game.

No one in constitutional law could bring it on like John Ely. He had game and he could rebound better than any one else. Many of the greatest results to be found in decisions of the Warren Court acquired their convincing intellectual undergirding after the fact, somewhat paradoxically, through the innovative emphasis on process in John Hart Ely's brilliant academic lawyering.

Someone once asked: "If the ends don't justify the means, what good are they?" Yet for John, the means became the end. He was much more objective than most of us are willing to become — and much more willing to sacrifice a result he greatly favored for a structural principle that he had thought about thoroughly and believed he had to embrace. Hardly a member of the Legal Process movement, John nonetheless actually gave new meaning to why we should think hard about legal processes. He reconstituted the paradox at the core of Martin Luther King, Jr.'s "I Have a Dream" speech. King emphasized the "fierce urgency of now" while he also warned that "[i]n the process of gaining our rightful place, we must not be guilty of wrongful

⁷ Bill Russell described how he developed an intimidating defensive technique that transformed basketball through his own "mental camera," through which he could analyze and remember separate elements of an opponent's moves. BILL RUSSELL & TAYLOR BRANCH, *SECOND WIND* 69-72, 154-55 (1979). He also explained that self-confidence, extending far beyond basketball, played a key role as he anchored the Boston Celtics during their remarkable run of championships: "Ironically, this feeling of independence makes you play better, and also helps you assume what I call the star's responsibility." *Id.* at 148.

deeds.”⁸ John also moved beyond widely accepted dichotomies to describe a moral landscape that, once articulated, seemed to have been in us all along.

To some, this wonderfully insightful individual’s bent toward classification depended at times on forced, somewhat ahistorical classifications (as in his analysis of contemporary gender discrimination issues). He seemed sometimes not to grasp fully the weightiness of rich context and to discount the importance of what was weird and incomparable — and he and I certainly differed about the relative importance of community in constitutional analysis⁹ — but he was a friend with whom you really could argue. Law often seems distressingly malleable, but John successfully taught that it is not infinitely so. He regularly, brilliantly demonstrated why this is a fundamental point that matters.

It could be that “true objectivity always requires love.”¹⁰ If John Ely was a transgressor in his particular quest for objective principles, he was a transgressor of legal orthodoxy who clearly loved law. And the intellectual creativity he wielded so well turned out to be both coruscating and strangely ennobling.

John dedicated *Democracy and Distrust* to Chief Justice Earl Warren, with the words: “You don’t need many heroes if you choose carefully.”¹¹ He was right. If anything, we are more than ever in need of exemplary people in law. It is fitting that we celebrate a great lawyer and scholar who captured our limitations with precision but who also expanded our possibilities. By transgressing within limits, John Hart Ely transformed our law.

⁸ Martin Luther King, Jr., *I Have a Dream*, Speech Delivered at the Lincoln Memorial (Aug. 28, 1963), reprinted in *A TESTAMENT OF HOPE* 217, 218 (James Melvin Washington ed., 1986).

⁹ Compare Ely, *Gerrymanders*, *supra* note 4, at 616 (“[C]ommunity is a concept so squishy that we should hesitate to entrust its specific application to either judges *or* politicians” (internal quotation marks omitted)), with AVIAM SOIFER, *LAW AND THE COMPANY WE KEEP* (1995).

¹⁰ EDWARD KAPLAN & SAMUEL DRESNER, ABRAHAM JOSHUA HESCHEL 103 (1998) (quoting Hugo Gressman, a Protestant theologian and Hebrew Bible scholar who delighted in collaborating with Jewish scholars in Berlin in the 1920s).

¹¹ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW*, at v (1980).